

MICHIGAN WISCONSIN PIPELINE CO.
(ON RECONSIDERATION)
GEOSEARCH, INC.
JOHN A. KOCHERGEN

IBLA 81-349

83-537

Decided May 7, 1984

Petition to reconsider Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982), holding, inter alia, the waiver/disclaimer of Resource Service Company, Inc., to be ineffective to waive its interest in oil and gas lease W 49836. Appeal from a decision of the Wyoming State Office, Bureau of Land Management, reinstating, inter alia, lease W 49836.

Petition for reconsideration granted; Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982), vacated in part; appeal of Geosearch, Inc., and John Kochergen dismissed; State Office decision of March 13, 1983, reversed in part.

1. Oil and Gas Leases: Applications: Amendments--Oil and Gas Leases:
Applications: Drawings--Oil and Gas Leases: First-Qualified
Applicant--Waiver

In Lowey v. Watt, 684 F.2d 957 (D.C. Cir. 1982), and Coyer v. Watt, 720 F.2d 626 (10th Cir. 1983), the amendment and disclaimer of Fred L. Engle, d.b.a. Resource Service Co. was held to be effective to waive the exclusive agency provision that formed part of the company's contract with its clients. The waiver being effective, neither the company nor Engle possessed an interest in a client's offer at the time of a drawing of simultaneously filed oil and gas lease offers so as to invalidate the offer.

APPEARANCES: Charles A. Grube, Esq., Milwaukee, Wisconsin, for petitioner; Melvin E. Leslie, Esq., Salt Lake City, Utah, for appellants.

OPINION BY ADMINISTRATIVE JUDGE HARRIS

On May 28, 1982, this Board issued Michigan Wisconsin Pipeline Co., 64 IBLA 247 (1982), affirming as modified in part and reversing in part a decision of the Wyoming State Office, Bureau of Land Management, dated

January 14, 1981. The State Office decision canceled oil and gas lease W 49836 and declared the overriding royalties of Resource Service Company (RSC) and Marlin H. Schneider null and void ab initio.

The facts of this case are set forth in the Board's decision at page 249:

The drawing entry card (DEC) of Marlin H. Schneider was drawn with first priority for parcel 232 in the February 1975 drawing of simultaneous oil and gas lease offers. On April 3, 1975, lease W 49836 was issued to Schneider effective May 1, 1975, and the DEC's of those persons drawn with second and third priority were returned as rejected. On April 21, 1975, Schneider executed an assignment of full record title to J. S. Harrell while reserving to himself a 5 percent overriding royalty. This assignment was approved by BLM on June 3, 1975, effective June 1. Shortly thereafter on June 18, 1975, Harrell executed an assignment of his interest in lease W 49836 to Michigan Wisconsin [Pipeline Co.], effective August 1, 1975. This assignment was approved by BLM on July 24, 1975, with a 2 percent overriding royalty reserved to Harrell. A further assignment was executed on August 22, 1975, when Michigan Wisconsin sold an undivided 50 percent interest in the lease to General American [Oil Co. of Texas]. This assignment was approved by BLM on October 14, 1975, effective October 1. On April 12, 1976, Harrell executed an assignment of 1 percent of overriding royalties to Donald D. Bradshaw. Finally, on November 9, 1977, Schneider filed an assignment of a percentage of his overriding royalties to Fred L. Engle, d.b.a. Resource Service Company.

Some 4-1/2 years after lease W 49836 had issued to Schneider, Geosearch[, Inc.,] protested the issuance of this lease, alleging that the agreement in effect between Schneider and Engle prior to the filing period created an interest in Engle which Schneider failed to disclose contrary to 43 CFR 3102.7 (1979). In view of the fact that numerous customers of Engle having the same agreement filed on this parcel, Geosearch continued, there resulted a violation of 43 CFR 3112.5-2 (1979) prohibiting multiple filings. Geosearch further alleged that it had succeeded to the interest of John A. Kochergen, whose DEC was drawn with third priority for parcel 232. [Footnote omitted.]

The nature of the undisclosed interest which Geosearch, Inc., charges RSC possessed has been the subject of numerous decisions of the Board. Briefly, RSC and its clients entered into an agreement whereby RSC retained the sole and exclusive authority to act as agent for its clients in the sale or assignment of any rights acquired through an offer filed by RSC on the client's behalf under the simultaneous leasing program. A detailed schedule of compensation was provided, which, in effect, granted RSC 16 percent of any compensation obtained for the sale of the lease. This exclusive agency was for a period of 5 years. Mark Woods, 79 IBLA 129 (1984).

After a protest was filed in the Wyoming State Office questioning the validity of RSC's exclusive agency, Engle submitted a document to the State Office entitled "Amendment and Disclaimer." This document purported to waive "any exclusive agency which I may have" provided that the exclusive agency was eventually held to create an "interest" in the lease as defined in 43 CFR 3100.0-5(b) (1977). In the event that such exclusive agency was found not to constitute an "interest," the waiver provided that "then and in that event this Amendment and Disclaimer shall be null and void as if never executed." Mark Woods, supra at 131.

In Michigan Wisconsin, the Board, relying upon prior Departmental precedent, affirmed a finding by BLM that RSC's attempt to waive or disclaim its exclusive agency was ineffective to achieve this result. 64 IBLA at 250. In addition, the Board reinstated the interests of Michigan Wisconsin, General American, Harrell, and Bradshaw. Id. at 251. Counsel for RSC and Schneider seek reconsideration of this decision contending, inter alia, that recent case law removes any doubt that the "Amendment and Disclaimer" was fully effective to eradicate any impermissible interest that RSC might have.

[1] Two cases cited by the Board in Michigan Wisconsin were the subject of judicial review, Alfred L. Easterday, 34 IBLA 195 (1978), and Frederick W. Lowey, 40 IBLA 381 (1979). On March 5, 1981, the Board's decision in Easterday was affirmed by the United States District Court for Wyoming in an unpublished decision, Coyer v. Andrus, No. C78-104K (Mar. 5, 1981). Two months later, the Board's holding in Lowey was affirmed by the District Court for the District of Columbia in a decision styled Lowey v. Watt, 517 F. Supp. 137 (1981). On July 2, 1982, however, the United States Court of Appeals for the District of Columbia reversed the district court and this Board in a decision styled Lowey v. Watt, 684 F.2d 957 (1982).

The court of appeals held that "[t]he unilateral waiver procedure, which RSC had worked out with BLM officials, was a reasonable response to legal uncertainties surrounding RSC's standard contracts." 684 F.2d at 959. The essential premise of the court's decision was that the Department had erred in failing to adopt procedures by which a party creating an illegal interest could waive such an interest. Thus, in the absence of a specific mechanism to waive an interest violating the regulations, the court found the procedure utilized by RSC was effective to remove the standard provision from the contract. Id. at 960; Mark Woods, supra at 134.

Sixteen months later, the U.S. Court of Appeals for the Tenth Circuit decided Coyer v. Watt, 720 F.2d 626 (1983), and followed the analysis of the D.C. Circuit. This Board and the district court were reversed.

Reconsideration of a Board decision may be granted only in extraordinary circumstances where, in the judgment of the Director of the Office of Hearings and Appeals or the Board, sufficient reason appears therefor. 43 CFR 4.21. Certainly, the recent decisions of the Tenth and District of Columbia Circuits establish sufficient reason for reconsideration.

In accordance with the decisions of the Tenth and District of Columbia Circuits, we hereby alter our decision of May 28, 1982. Continued application of Board precedent to affirm cancellation of leases or, as in the instant case, retained interests can no longer be supported. Insofar as our decision purported to cancel any interest of Schneider or RSC, it is hereby vacated.

On March 15, 1983, while RSC's petition for reconsideration was pending before this Board, the Wyoming State Office issued a decision reinstating lease W 49836 and the interests of certain transferees identified by the Board in its May 28, 1982, decision. ^{1/} Geosearch, Inc., and John Kochergen appealed this State Office action by a pleading filed on April 14, 1983. By a motion filed on May 16, 1983, appellants ask that all proceedings affecting their appeal, including but not limited to any statement of reasons on appeal, be stayed until 10 days after this Board has rendered its decision on the petition for reconsideration.

The motion is denied and the appeal is dismissed. The waiver and disclaimer of Engle having been held to be effective by the aforementioned circuit courts, no interest was held by Engle that Schneider was required to disclose. Appellants' objection to RSC's exclusive agency agreement is, thus, fully answered by the recent litigation. The ministerial implementation by BLM of a decision by this Board does not confer a new right of appeal on a party that appeared before the Board. Insofar as BLM's decision of March 15, 1983, is inconsistent with the aforementioned circuit court decisions by canceling the overriding royalty interests of RSC and Schneider, however, it is hereby reversed.

Since appellants failed to appeal from rejection of their offer and thus have no viable claim based thereon, see Goldie Skodras, 72 IBLA 120 (1983), they cannot receive lease W 49836 regardless of any irregularities that might have existed in Schneider's offer. See Geosearch v. Andrus, 517 F. Supp. 1245 (D. Wyo. 1981). Assuming such irregularities existed, lease W 49836 would be canceled by BLM. 43 CFR 3108.2-3 (1979). Lands in canceled leases are subject to leasing only in accordance with 43 CFR Subpart 3112, dealing with the simultaneous leasing program. 43 CFR 3112.1-1 (1979). In no event could appellants benefit from further examination of lease offer W 49836. Such an analysis caused the District Court of Wyoming to conclude that Geosearch, Inc., lacked standing to sue in that court. Id. at 1247-48. See also Geosearch, Inc. v. Andrus, 508 F. Supp. 839, 845 (D. Wyo. 1981), holding that Geosearch, Inc., lacked standing because it failed to appeal the issuance of a lease within 30 days after it was served with a decision rejecting its offer. See further Geosearch, Inc. v. Watt, 721 F.2d 694, 699 (10th Cir. 1983), holding that Geosearch, Inc., could not contest an improperly issued lease if the lease had been assigned to a bona fide purchaser.

^{1/} Regulation 43 CFR 4.21(c) provides that the filing and pendency of a request for reconsideration shall not operate to stay the effectiveness of the decision involved unless so ordered by the Board or by the Director. BLM was not prohibited by regulation, therefore, from issuing its decision during the pendency of the petition.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, reconsideration of Michigan Wisconsin Pipeline Co., *supra*, is hereby granted and that decision is vacated insofar as it purported to cancel any interest of Schneider or RSC; the appeal of Geosearch, Inc., and Kochergen is hereby dismissed and the motion to stay denied; the State Office decision of March 15, 1983, is reversed insofar as it cancels the overriding royalty interests of RSC and Schneider.

Bruce R. Harris
Administrative Judge

We concur:

Will A. Irwin
Administrative Judge

Edward W. Stuebing
Administrative Judge

